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Supreme Court of the United States

October Term, 1961

No. 63

MORGAN C. CHEWNING,
Petitioner

v.

W. K. CUNNINGHAM, JR., SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY,
Respondent

MOTION TO DISMISS THE WRIT OF CERTIORARI
AND
BRIEF ON BEHALF OF THE RESPONDENT

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W. K. CUNNINGHAM, JR., SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY,

Respondent

MOTION TO DISMISS THE WRIT OF CERTIORARI AND BRIEF ON BEHALF OF THE RESPONDENT

OPINION BELOW

The Supreme Court of Appeals of Virginia did not write an opinion in the case at bar, but entered an order denying and dismissing the petition for a writ of certiorari (R. 29) and affirming the judgment of the Law and Equity Court of the City of Richmond (R. 13). Honorable Robert Lewis Young, one of the judges of the Law and Equity Court of the City of Richmond, wrote a short memorandum opinion which is found in the printed record commencing on page 9.

JURISDICTION

The petitioner purports to have invoked the jurisdiction of this Court under the provisions of Title 28 U. S. C.

§1257(3). Petitioner has alleged in this Court that he has been denied a right guaranteed to him by the due process and equal protection of the law clauses of the Fourteenth Amendment to the Constitution of the United States. This Court granted petitioner's motion to proceed in forma pauperis and granted certiorari on March 6, 1961.

MOTION TO DISMISS THE WRIT OF CERTIORARI

Respondent, by counsel, moves this Court to dismiss the writ of certiorari granted by this Court on March 6, 1961, for the reason that said writ was improvidently granted.

ARGUMENT

The Writ of Certiorari Should Be Dismissed for the Reason That It Was Improvidently Granted

The respondent earnestly believes that this Honorable Court upon a reconsideration of the record in this case will find that the Federal constitutional question now raised by petitioner in this Court was not presented to the Law and Equity Court of the City of Richmond in the petition for a writ of habeas corpus which forms a basis for this proceeding. Essential to the understanding of the respondent's position in the premises is a careful examination of the record in the case at bar. It is well settled that this Court will not consider a Federal constitutional question unless it is presented in clean-cut, concrete and unclouded form. *Rescue Army* v. *Municipal Court of Los Angeles,* 331 U. S. 549. It will be hereinafter demonstrated that the petition for a writ of habeas corpus filed by the petitioner, Morgan C. Chewning, in the Law and Equity Court of the City of Richmond did not raise any Federal constitutional question.

Chewning's claims for relief were based upon alleged violations of a State statute and a provision of the Constitution of the Commonwealth of Virginia.

It is well settled that the well-pleaded allegations of the petition must be accepted as true when they are not denied by the State. *Cash* v. *Culver*, 358 U. S. 633; *Hawk* v. *Olson*, 326 U. S. 271; *Morris* v. *Smyth*, 202 Va. 832, 120 S. E. 2d 465. Indeed, petitioner on page 4 of his brief concedes the preceding statement to be true. Moreover, petitioner in his brief relies on the petition for a writ of habeas corpus, and the two exhibits attached thereto which are printed on pages 1 through 7 of the record. Let us then examine carefully the petition for a writ of habeas corpus filed by petitioner in the Law and Equity Court of the City of Richmond.

Petitioner's grounds for relief are set forth on pages 2 and 3 of the printed record. Petitioner's first contention is quoted below:

> "That the Circuit Court of the City of Richmond, Virginia proceeded to try and convict, and sentence the petitioner to imprisonment in the Virginia State Penitentiary for the space and period of ten years, with one-year of said sentence suspended, without first giving the petitioner the benefit and aid of the assistance of counsel to represent him, that such assistance of counsel was requested by the petitioner at the time of his trial on the 25th day of June, 1958." (R. 2)

Petitioner's first allegation can, therefore, be summarized, "I was tried without assistance of counsel although I requested assistance of counsel." It is of paramount importance to emphasize that petitioner fails to state any reason why he requested that the court provide him with counsel. He carefully avoids a statement that he was a pauper, an indigent, or that he was without funds at the time of his recidivist hearing. He does not allege any of the foregoing

facts. He merely states that he wanted assistance of counsel. It is manifest that this bare allegation presents no question, State or Federal. Respondent can find no case which holds that petitioner would be entitled to court-appointed counsel in any case in the absence of a statement of poverty, or an allegation that he is indigent and without funds. The record is completely silent as to petitioner's financial condition on June 25, 1958, the day on which his recidivist hearing took place. We cannot add to or subtract from petitioner's allegation in this regard, but are bound by the aforementioned cases which hold that his allegations must be accepted as true. It is manifest that even in a criminal case the court is not obliged to appoint counsel for an accused who does not assert that he is without funds to employ a lawyer. Petitioner does not elaborate on the bare statement that he was tried without counsel. Petitioner's statement in this regard is incomplete, and one can only speculate as to the facts surrounding his trial.

Petitioner relies on § 19-214.1 of the Code of Virginia, 1950, as amended (now § 19.1-241 of the Code of Virginia), and Section 8 of the Virginia Constitution. Petitioner states in his petition:

> "Your petitioner further says that in the Courts of the Commonwealth of Virginia, before an accused person can be tried and convicted, and sentenced to imprisonment in the Virginia State Penitentiary, if he is without the aid of a competent attorney at law to represent him, that under the provisions of Section 19-214.1 of the Code of Virginia (1952), and Article 1, Section Eight of the Constitution of the Commonwealth of Virginia, the Court must first appoint to the accused, an attorney at law to represent him; that said Section 19-214.1 of the Code of Virginia, reads:" (R. 2)

Section 19-214.1 (now §19.1-241) of the Code of Virginia reads as follows:

> "§19.1-241. Appointment of defense counsel in felony cases.—In any case in which a person is charged with a felony and is not represented by counsel, the court, before accepting the plea of such person, shall by order entered of record appoint an attorney at law to represent him. (Code 1950, §19-241.1; 1952, c. 348; 1960, c. 366.)"

This statute is applicable only to felony prosecutions. Did petitioner stand charged with a felony? The answer to this question is provided by the Supreme Court of Appeals of Virginia in the case of *King* v. *Lynn, Sup't.*, 90 Va. 345, 185 S. E. 439. In any event, petitioner relied herein on an enactment of the General Assembly of the Commonwealth of Virginia. He did not rely on any right guaranteed to him by the Federal Constitution, nor does he relate this provision of the Code of Virginia to any provision of the Constitution of the United States. He has, therefore, failed to claim, allege or assert any Federal constitutional right in connection with this statute.

Section 8 of the Constitution of Virginia is set forth below:

> "Concerning criminal prosecutions generally.—That in criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty. He shall not be deprived of life or liberty, except by the law of the land or the judgment of his peers; nor be compelled in any criminal proceeding to give evidence against himself, nor be put twice in jeopardy for the same offense.

> "Laws may be enacted providing for the trial of offenses not felonious by a justice of the peace or other inferior tribunal without a jury, preserving the right of the accused to an appeal to and a trial by jury in some court of record having original criminal jurisdiction. Laws may also provide for juries consisting of less than twelve, but not less than five, for the trial of offenses not felonious, and may classify such cases, and prescribe the number of jurors for each class.
>
> "In criminal cases, the accused may plead guilty; and, if the accused plead not guilty, with his consent and the concurrence of the Commonwealth's attorney and of the court entered of record, he may be tried by a smaller number of jurors, or waive a jury. In case of such waiver, or plea of guilty, the court shall try the case."

Petitioner's second basis for relief is grounded upon the above-quoted provision of the Constitution of Virginia. He has again failed to relate this provision of the Virginia Constitution to any right guaranteed to him by the Federal Constitution. Petitioner does not here rely upon any Federal constitutional right. Indeed, he does not mention any provision of the United States Constitution.

The petition for a writ of habeas corpus filed in the Law and Equity Court of the City of Richmond reads in part as follows:

> "Your petitioner further says that the said Circuit Court of the City of Richmond, Virginia, on the 25th day of June, 1958, did not have the jurisdiction, power and authority, to proceed against the petitioner, to convict the petitioner, and to sentence the petitioner to imprisonment in the Virginia State Penitentiary for the space and period of ten years, with one-year suspended, without the assistance of counsel to represent him." (R. 3)

Petitioner fails to state the legal basis for this statement. It can only be concluded that this statement relates back to his allegations made in connection with the Virginia statute and the provision of the Virginia Constitution hereinbefore set forth. Petitioner does not state that he is relying upon any right guaranteed to him by the United States Constitution.

In conclusion Chewning says in his petition for a writ of habeas corpus:

> "Your petitioner further says that said ten-year sentence, with one-year suspended, was void because the Circuit Court of the City of Richmond failed to comply with the laws of the Commonwealth of Virginia, to-wit: Section 19-214.1 of the Code of Virginia, and the Supreme Court's ruling in Watkins v. Commonwealth, 174 Va. 518, then in effect in the Commonwealth of Virginia; and which statute and ruling of law was, and is still in effect." (R. 3)

In summing up the legal basis for his contention that he is being illegally detained, petitioner again makes reference to §19-214.1 of the Code of Virginia, 1950, as amended (now §19.1-241), and Section 8 of the Virginia Constitution. He does not rely on any provision of the United States Constitution in asserting that he was entitled to counsel under the facts as stated in his petition.

Respondent has endeavored to set forth in careful and complete detail petitioner's contentions as contained in his petition for a writ of habeas corpus filed in the Law and Equity Court of the City of Richmond. This petition forms the basis for this proceeding. Respondent has demonstrated conclusively the following facts:

1. Petitioner does not allege or suggest that he was indigent, that he was a pauper or that he was without funds at the time he asked for assistance of counsel. He does not state that he told the court that he was a pauper, an indigent, or that he was without funds.

2. Petitioner relies on § 19-214.1 of the Code of Virginia, 1950 (now § 19.1-241), and contends that this statute required the Judge of the Circuit Court of the City of Richmond to appoint counsel to represent him.

3. Petitioner relies on Section 8 of the Constitution of Virginia and suggests that this provision of the Constitution required the Judge of the Circuit Court of the City of Richmond to appoint counsel to represent him.

4. Petitioner has failed to mention anywhere in the petition for a writ of habeas corpus the words United States Constitution, Federal Constitution, Fourteenth Amendment to the Constitution of the United States, or a right guaranteed by the United States Constitution.

In further support of respondent's position in the premises, we quote from page 5 of the brief on behalf of the petitioner wherein petitioner summarizes the allegations as made in the petition:

> "Petitioner alleges that the Court proceeded to try, convict and sentence him to ten years imprisonment 'without first giving the petitioner the benefit and aid of the assistance of counsel to represent him, that such assistance of counsel was requested by the petitioner at the time of his trial on the 25th of June, 1958.'" (R. 2)

It is submitted that petitioner has failed to allege, state or suggest in the petition for a writ of habeas corpus which

he filed below that he was a pauper, an indigent, or that he was without funds on June 25, 1958. Moreover, in this connection, it is important to examine petitioner's summary of argument on pages 8, 9 and 10 of the brief filed in this Court. In the paragraphs headed I and II, petitioner does not state that he was an indigent on August 25, 1958. It is not until we examine the paragraph headed III that we find for the first time that petitioner rather blithely states that he was indigent on June 25, 1958. For the very first time petitioner has stated in his brief filed in this Court that he was indigent when he was tried as a third-time offender. Moreover, in summarizing his position in the case at bar in the section of his brief headed Argument, commencing on page 10 of his brief, petitioner asks this Court to reverse the judgment of the Supreme Court of Appeals of Virginia and remand the case for a hearing. Petitioner does not suggest therein that he was indigent at the time of his trial as a third-time offender.

Let us examine very briefly the opinion of the trial judge, Honorable Robert Lewis Young, which is found on pages 9 through 12 of the printed record. Judge Young never finds as a fact that the petitioner, Morgan C. Chewning, was an indigent at the time of the recidivist proceeding, which took place on June 25, 1958. The word "pauper" or "indigent" does not appear in Judge Young's opinion. Judge Young never suggests that Chewning was indigent or without funds on June 25, 1958. The facts which Judge Young accepts as true are the facts which were set forth in the petition for a writ of habeas corpus then pending before him. As we have repeatedly emphasized, petitioner does not allege, state or suggest that he was a pauper when he was tried as a third-time offender, and Judge Young finds this to be true.

Judge does state in his memorandum opinion that petitioner relies on the Fourteenth Amendment to the Constitution of the United States. Respondent has been unable to ascertain the basis for this statement in view of the contents of the petition. Moreover, Judge Young discusses at length the fact that petitioner relies upon a Virginia statute and a provision of the Constitution of Virginia. Judge Young finds that the petitioner's reliance upon the aforesaid provision of law and provision of the Constitution of Virginia is not well placed, and that the same did not require the Judge of the Circuit Court of the City of Richmond to appoint counsel to represent Chewning when he was tried as a third-time offender. In any event, it is manifest that in mentioning the Fourteenth Amendment to the Constitution of the United States, Judge Young has considered something which is not contained in the petition.

Moreover, Judge Young was without authority to reach a decision on the merits of the case. This Court's attention is directed to the provisions of §8-598 of the Code of Virginia, 1950, as amended, which is set forth below:

> "§8-598. How directed and returnable.—The writ shall be directed to the person in whose custody the petitioner is detained and shall be made returnable as soon as may be before the court or judge ordering the same or any other of such courts or judges.
>
> "And it is further provided that in the event the allegations of illegality of the petitioner's detention present a case for the determination of unrecorded matters of fact relating to any previous judicial proceeding, such writ, if issued, shall be made returnable before the court in which such judicial proceeding occurred. (Code 1919, §5849; 1958, c. 215.)"

Judge Young had two choices. He could determine that the petitioner's allegations, if true, presented a case wherein

a hearing should be held. Judge Young could then have issued a writ of habeas corpus and made the same returnable to the Circuit Court of the City of Richmond, pursuant to §8-596 of the Code of Virginia. Chewning was then detained within the jurisdiction of the Law and Equity Court of the City of Richmond. *Morris* v. *Smyth*, 202 Va. 832, 120 S. E. 2d 465. In the alternative, Judge Young could deny the petition on the ground that the allegations were insufficient to justify a hearing. It is manifest that Judge Young was not presented with a pure question of law which he could decide without taking evidence. Judge Young was clearly without authority to take any action on the petition other than that outlined above.

It is important to note that petitioner was represented at the time he filed his petition for a writ of habeas corpus by court-appointed counsel. Said counsel could have amended the petition to include additional facts not set forth therein, and if this had been done, it is possible that this case would be in a different posture. It is of particular importance to emphasize that said counsel did not amend the petition. We are, therefore, limited in the premises to a consideration of the petition as filed.

Petitioner has failed to state sufficient facts in connection with the action of the Judge of the Circuit Court of the City of Richmond in refusing to appoint counsel to represent him at his recidivist hearing. Counsel for petitioner was appointed with his consent and the order of the Law and Equity Court of the City of Richmond, of February 5, 1960, denying and dismissing the petition for a writ of habeas corpus states that said attorney "having fully and ably performed" his duties, he is discharged from further responsibility in this matter. It can only be concluded that court-appointed counsel conferred with Chewning and de-

termined that there were no additional allegations which could be made.

Let us examine briefly the decision of the Supreme Court of Appeals of Virginia of June 14, 1960 wherein the petition for a writ of error was denied. The Court wrote no opinion, and we must therefore look to the applicable statutes of Virginia and the decisions of the Supreme Court of Appeals to determine the import of this decision. As heretofore emphasized, the statutes of Virginia, to-wit: 8-596 and 8-598 of the Code of Virginia, 1950, as amended, are controlling herein. The Supreme Court of Appeals was called upon by the petition for a writ of error to determine whether or not the decision of the Law and Equity Court of the City of Richmond was correct, i.e., should the petition for a writ of habeas corpus have been dismissed? The Judge of that Court was clearly without authority to hold a hearing on the petition. Indeed, on page 6 of petitioner's brief, footnote 3, this fact is admitted. The Supreme Court of Appeals of Virginia stated in the case of *Penn* v. *Smyth*, 188 Va. 368, 49 S. E. 2d 610: "It is elementary that a petition of this nature must allege facts and that mere conclusions or opinions of the pleader will not suffice to make out a case." It is manifest that Court must have refused the petition for a writ of error on the ground that petitioner had failed to state a case, and that, in any event, Judge Young could not hold a hearing on said petition. When petitioner filed his petition for a writ of error (R. 19-28) he raised a Federal constitutional question for the first time. He had not heretofore mentioned said question. Moreover, an examination of the petition for a writ of error reveals that petitioner raises several questions which were not mentioned in the petition for a writ of habeas corpus. In addition, petitioner alleges facts which were not set forth in the petition

filed in the Law and Equity Court. It is significant to note that petitioner does not state in his petition for a writ of error that he was indigent when he was tried as a third-time offender. The Court could only conclude that petitioner had failed to state a case.

It is well settled that the record must establish that the Federal constitutional question was raised by petitioner, and that the State found or was required to find that said Federal claim was presented to it. *Newsom* v. *Smyth,* 5 L. Ed. 2d 803. Respondent has clearly demonstrated first that the petition for a writ of habeas corpus did not present sufficient facts to justify any action of the Law and Equity Court of the City of Richmond other than dismissal. Respondent has shown that petitioner did not raise any Federal constitutional question in his petition for a writ of habeas corpus. Respondent has emphasized repeatedly that petitioner has failed to assert, allege or suggest that he was a pauper at the time of his trial as a third-time offender. Moreover, as petitioner has progressed from the Law and Equity Court to the Supreme Court of Appeals of Virginia and thence to this Court, he has continued to allege additional facts and further claims for relief. Indeed, in his brief filed in this Court, petitioner has alleged even more facts which were not set forth in the pleadings and papers heretofore filed.

We submit that the petition for a writ of habeas corpus does not raise a Federal question, and that said Federal question was not decided by the Supreme Court of Appeals of Virginia. Respondent has demonstrated that there is considerable uncertainty as to the precise grounds for the decision of the Supreme Court of Appeals of Virginia in the case at bar, and urges this Court to decline to review the Federal question now asserted to be present. It is well settled that under these circumstances, this Court will not

attempt to review a Federal question which is presented to it for the first time in the history of the proceedings. *Minnesota* v. *National Tea Company*, 309 U. S. 551.

CONCLUSION

For the reasons hereinbefore stated, it is earnestly submitted that the writ of certiorari should be dismissed as improvidently granted.

BRIEF ON BEHALF OF THE RESPONDENT

PRELIMINARY STATEMENT

Respondent earnestly believes that this Court upon consideration of the foregoing motion and argument made in support thereof will dismiss the writ of certiorari heretofore granted petitioner in this case. Out of an abundance of precaution, however, respondent files this brief in the case at bar.

Respondent finds it most difficult to answer the many arguments made by petitioner in his brief for the reason that the same are grounded upon the assumption that the petitioner was indigent at the time he was tried as a third-time offender, and that he raised a Federal constitutional question in the petition for a writ of habeas corpus filed in the Law and Equity Court of the City of Richmond. Moreover, respondent is faced with the problem of answering many other factual allegations which are not contained in the petition filed below. In addition, petitioner has made several assumptions and conclusions of law in connection with the Virginia statutes in question which are manifestly of his own belief and are not supported by any decision of

the Supreme Court of Appeals of Virginia. Furthermore, petitioner has so intermingled the foregoing that it is virtually impossible to separate the "wheat from the chaff."

QUESTION PRESENTED

Is a prisoner who is proceeded against as a third-time offender in conformity with § 53-296 of the Code of Virginia (1950) entitled to court-appointed counsel in the absence of any statement by said prisoner that he is indigent or that he is a pauper?

ARGUMENT

A Prisoner Who Is Proceeded Against as a Third-Time Offender in Conformity With Section 53-296 of the Code of Virginia (1950) Is Not Entitled to Court-Appointed Counsel in the Absence of Any Statement by Said Prisoner That He Is Indigent or That He Is a Pauper.

Petitioner and respondent are in full agreement that the facts as set forth in the petition for a writ of habeas corpus must be accepted as true. Petitioner was proceeded against as a third-time offender in conformity with the provisions of § 53-296 of the Code of Virginia (1950) which is set forth below:

> "§ 53-296. Convicts previously sentenced to like punishment; additional confinement.—When a person convicted of an offense, and sentenced to confinement therefor in the penitentiary, is received therein, if it shall come to the knowledge of the Director of the Department of Welfare and Institutions that he has been sentenced to a like punishment in the United States prior to the sentence he is then serving, the Director of the Department of Welfare and Institutions shall give information thereof without delay to the Circuit Court of the city of Richmond. Such court shall cause the convict to be brought before it, to be tried upon an

information filed, alleging the existence of records of prior convictions and the identity of the prisoner with the person named in each. The prisoner may deny the existence of any such records, or that he is the same person named therein or both. Either party may, for good cause shown, have a continuance of the case for such reasonable time as may be fixed by the court. The existence of such records, if denied by the prisoner, shall be first determined by the court, and if it be found by the court that such records exist, and the prisoner says that he is not the same person mentioned in such records, or remains silent, his plea, or the fact of his silence, shall be entered of record, and a jury of bystanders shall be impaneled to inquire whether the convict is the same person mentioned in the several records. If they find that he is not the same person, he shall be remanded to the penitentiary; but if they find that he is the same person, or if he acknowledge in open court after being duly cautioned, that he is the same person, the court may sentence him to further confinement in the penitentiary for a period of not exceeding five years, if he has been once before sentenced in the United States to confinement in the penitentiary; but if he has been twice sentenced in the United States to such confinement, he may be sentenced to be confined in the penitentiary for such additional time as the court trying the case may deem proper. This section, however, shall not apply to successive convictions of petit larceny. (Code 1919, §5054; 1948, p. 826; R. P. 1948, §53-296.)"

Petitioner appeared in the Circuit Court of the City of Richmond on June 25, 1958 to answer the Information filed by the Attorney for the Commonwealth for the City of Richmond. He asked the Court to appoint counsel to represent him, which request was refused, whereupon the Court ordered that he be confined in the penitentiary for a period of ten years and suspended one year of said sentence.

The foregoing are the facts as set forth by petitioner in his petition for a writ of habeas corpus, and form the sole and entire basis for this proceeding.

The purpose of § 53-296 of the Code of Virginia (1950) was outlined by the Supreme Court of Appeals of Virginia in *Wesley* v. *Commonwealth*, 190 Va. 268, 56 S. E. 2d 362:

> "The underlying and paramount purposes of the statute are to protect society against habitual criminals and to impose further punishment against that particular class of offenders." (190 Va. at page 276)

It is well settled that the sole question before the Circuit Court of the City of Richmond on June 25, 1958 was that of identification. Was Morgan C. Chewning, who then stood before the Court, the person named in the Information? *King* v. *Lynn*, 90 Va. 345, 18 S. E. 439. The exact nature of this proceeding, however, has never been determined by the Supreme Court of Appeals of Virginia. It has spoken of the statute as "highly penal," and as such subject to strict construction. *Wesley* v. *Commonwealth*, *supra*. But the Court has never determined the character of the proceeding. Petitioner has asserted in his brief that the recidivist proceeding is "clearly criminal," but he has failed to cite a Virginia case in support of his theory. Indeed, this Court held in connection with a similar West Virginia statute in the case of *Graham* v. *West Virginia*, 224 U. S. 616, as follows:

> *"By this proceeding he was not held to answer for an offense; the information did not allege crime.* As was said by the Supreme Court of Appeals of West Virginia: 'It (the information) alleges that he has been held to answer for crime, and that he stands convicted of it through the indictment of a grand jury. It points

> him out as a convict already held, upon whom rests the general sentence of the law of life imprisonment. . . . The proceedings under the statute are for identification only. They are clearly not for the establishment of guilt. The question of guilt is not reopened.' " (Italics supplied)

This Court said in *Gryger* v. *Burke*, 334 U. S. 728, 732:

> "* * * The sentence as a fourth offender or habitual criminal is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one. Cf. Moore v. Missouri, 159 U. S. 673, 40 L. Ed. 301, 16 S. Ct. 179; McDonald v. Massachusetts, 180 U. S. 311, 45 L. Ed. 542, 21 S. Ct. 389; Graham v. West Virginia, 224 U. S. 616, 56 L. Ed. 917, 32 S. Ct. 583; Carlesi v. New York, 233 U. S. 51, 58 L. Ed. 843, 34 S. Ct. 576; Pennsylvania ex. rel. Sullivan v. Ashe, 302 U. S. 51, 82 L. Ed. 43, 58 S. Ct. 59."

Petitioner has failed to cite one case that holds that in the absence of a statement by the accused that he is indigent, that he is entitled to have counsel appointed to represent him, even in a criminal proceeding. The reason for this failure is explained by the fact that there is no reported case which so holds. It is, therefore, quite clear that a person who is not indigent is not entitled to court-appointed counsel in a criminal proceeding. It follows from this that a prisoner who is not indigent is not entitled to court-appointed counsel in a recidivist proceeding.

Moreover, petitioner has failed to cite a decision of this Court which holds that even an indigent convict is entitled to court-appointed counsel in a recidivist proceeding. On page 15 of his brief he cites *Reynolds* v. *Cochran*, 365 U. S.

525, and *Chandler* v. *Fretag*, 248 U. S. 3. In both of these cases this Court held that a person proceeded against as a multiple offender has the constitutional right to the assistance of his own counsel. This decision of the Court in both cases rested upon this narrow ground.

Hudson v. *North Carolina*, 363 U. S. 697, and *Ferguson* v. *Georgia*, 365 U. S. 570, cited by petitioner on page 29 of his brief involved factual situations which are in no way similar to the facts in the case at bar, and consequently are not applicable herein.

Of course, *McNeal* v. *Culver*, 365 U. S. 109, cited on page 28 of petitioner's brief; *Williams* v. *Kaiser*, 323 U. S. 471, and *Powell* v. *Alabama*, 287 U. S. 45, cited on page 31 of petitioner's brief, are not applicable herein because in all three of these cases the petitioner was indigent at the time he was tried. For the same reason *Griffen* v. *Illinois*, 351 U. S. 12, found on page 40 of petitioner's brief, *Burns* v. *Ohio*, 360 U. S. 252, and *Smith* v. *Bennett*, 365 U. S. 708, found on page 41 of petitioner's brief, are not applicable herein.

Petitioner states on page 32 of his brief "The only possible argument that can be made against granting petitioner relief is the now out-moded distinction between capital and non-capital State criminal cases. That distinction, applied to the right to counsel and to no other constitutional right, stems from Betts v. Brady, 316 U. S. 455." The General Assembly of Virginia recognized the need for counsel in all felony prosecutions and, in 1948, § 19-278.1 of the Code of Virginia was enacted (see Reorganization Provisions, Code of Virginia). This section is now § 19.1-241 of the Code of Virginia, 1950. As hereinbefore pointed out, a recidivist proceeding in Virginia is for the sole purpose of establishing the identity of the prisoner, and is not a felony prosecu-

tion. In any event, this Court's holding in *Betts* v. *Brady*, 316 U. S. 455, has yet to be overruled, and there is no cause to do it in the case at bar.

In the instant case, the circumstances are of such character as to indicate that the petitioner failed to state a case. Petitioner alleges only that he was denied assistance of counsel at his recidivist hearing. This is the sole basis for relief as set forth in his petition. We submit that petitioner has failed to show sufficient factual data to justify a hearing below.

Moreover, petitioner's arguments are foreclosed by this Court's holding in *Gryger* v. *Burke*, 334 U. S. 728, wherein this Court stated that in the absence of exceptional circumstances, the State is not required to provide counsel for a defendant in a recidivist proceeding.

To sum our position in the case at bar, we quote the following statement which is found on page 27 of petitioner's brief:

"LAW ADDRESSES ITSELF TO ACTUALITIES."[1]

Respondent submits that petitioner failed to allege sufficient facts in his petition for a writ of habeas corpus. Petitioner did not allege that he was indigent, that he was a pauper or that he was without funds on June 25, 1958. Petitioner alleged only that he was denied court-appointed counsel. Petitioner was represented at his habeas corpus proceeding by counsel, and said counsel did not amend the petition to include any additional facts. The reality of the situation is that the colloquy between the Court and the petitioner on June 25, 1958 is unknown at this time. Petitioner has cited no decision of this Court which supports

[1] *Griffin* v. *Illinois*, 351 U. S. 12, 23 (concurring opinion).

the view that in the absence of a statement of poverty or an allegation of indigency an accused is entitled to court-appointed counsel on a criminal charge in the trial court. It is, therefore, manifest that in the absence of a statement of poverty, a prisoner is not entitled to court-appointed counsel at the time he is proceeded against as a multiple offender.

CONCLUSION

For the foregoing reasons, counsel for the respondent earnestly submits that petitioner has failed to present a Federal constitutional question, and that the judgment of the Supreme Court of Appeals of Virginia should be affirmed.

Respectfully submitted,

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